

Department of Labor and Industry
Board of Personnel Appeals
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Helena, MT 59620-1503
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 18-2011

THE UNIVERSITY FACULTY)
ASSOCIATION OF THE UNIVERSITY OF)
MONTANA, MEA-MFT,)
Complainant,)
-vs-)
HON. SHEILA STEARNS,)
COMMISSIONER OF HIGHER)
EDUCATION, MONTANA UNIVERSITY)
SYSTEM,)
Defendant.)

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

I. Introduction

On March 18, 2011, J. Douglas Coffin, President of the University Faculty Association, hereinafter UFA, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the Montana University System, hereinafter MUS, bargained in bad faith, a violation of Section 39-31-401(5), MCA. Specifically, the UFA alleges that the MUS failed to provide a timely counter proposal to a UFA December 23, 2010, compensation proposal. UFA further alleges that MUS also failed to send a person to bargaining sessions with appropriate authority to negotiate compensation proposals. Catherine Swift, Chief Counsel for the MUS responded to the charge in a timely manner and denied that MUS had violated Montana law. Thorin Geist, attorney at law, has now been retained by the UFA and represents the Association in this matter.

John Andrew was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties and communicated with them as necessary in the course of the investigation.

II. Findings and Discussion

MUS and the UFA have a long history of collective bargaining with the most recent contract being in full force and effect for a term of 10 working days after ratification, or July 1, 2009, whichever is later, through June 30, 2013. This four year agreement provided for expiration of the compensation provisions of the contract on June 30, 2011.

1 The economic reopener on compensation is governed by section 2.700 of the collective
2 bargaining agreement. Non-compensation provisions were also subject to reopening
3 mid-term in the agreement upon mutual consent of the parties.
4

5 Section 2.700 of the collective bargaining agreement provides:
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7 The parties shall meet no later than seven and one-half (7 ½) months prior to the
8 expiration date of the contract to commence negotiations. At the initial meeting
9 the parties agree to exchange lists of new items and of those existing articles
10 they intend to modify, amend, delete or otherwise change. The scope of
11 bargaining during that round of negotiations shall be limited to provisions
12 included on the exchange of lists. However, the parties may mutually agree to
13 expand the list at any time.
14

15 The UFA and Board agree to commence negotiations within a mutually
16 agreeable time after the lists have been exchanged, but no later than fifteen (15)
17 calendar days after the exchange.
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20 The collective bargaining agreement also contains a grievance procedure culminating in
21 final and binding arbitration with a grievance defined as “. . . any dispute which arises
22 regarding the misapplication and/or misrepresentation or other violation of a provision of
23 this agreement by the Administration . . .” This is mentioned as, quite arguably,
24 interpretation of what was exactly meant by the language in 2.700 should be subject to
25 deferral to the grievance provisions of the contract and interpretation by an arbitrator,
26 See, for example Collyer Insulated Wire, 192 NLRB 387, 77 LRRM 1931 and ULP 43-81,
27 William Converse v Anaconda Deer Lodge County and ULP 44-81 James Forsman v
28 Anaconda Deer Lodge County. However, since a grievance was not filed and since the
29 question before the investigator also involves allegations of lack of authority to bargain
30 economic proposals, something not appropriately before an arbitrator, rather than
31 bifurcate the process both issues are appropriately before the Board of Personnel
32 Appeals.
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35 In addition to the contractual provisions concerning bargaining obligations, the UFA and
36 MUS also adopted extensive ground rules to govern their bargaining. Consistent with
37 2.700 of the bargaining agreement the ground rules provided a timetable for
38 negotiations. Ground rule #7. provides:
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41 The parties will meet within the first week of December 2010. Consistent with the
42 CBA, a second meeting shall occur within 15 days of the first. The parties will
43 then meet consecutively with each subsequent meeting occurring within 15 days
44 of the previous meeting, unless the parties mutually agree otherwise.
45

46 Ground rule #8 addresses the submission of proposals and provides that in addition to
47 no new items being submitted for negotiations absent mutual agreement:
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1 The parties agree to receive, consider and respond in good faith to proposals
2 and counterproposals in a timely manner.
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4 The ground rules also cover additional topics including use of an interest-based
5 approach to negotiations with one example of the same addressed in the ground rules
6 as being:
7

8 Bargaining in good faith by maintaining flexibility on issues with the goal of
9 reaching tentative agreement. The negotiating teams for both parties pledge
10 their best efforts to contribute to a new collective bargaining agreement by the
11 application of interest-based bargaining methods.
12

13
14 Consistent with the collective bargaining agreement the UFA and MUS met on
15 December 12, 2010, and conducted an organizational meeting on that date.
16

17 Also consistent with the bargaining agreement, the parties met again on December 23,
18 2010. On this date the parties signed off on the ground rules for bargaining. Included in
19 the ground rules was the composition of the respective bargaining teams with the UFA
20 represented by Keith Parker, Chief Negotiator; Doug Coffin, UFA President; Phil
21 Condon, UFA Vice President; Allisen Justman, UFA designated note taker; and Tom
22 Burgess, MEA-MFT Field Consultant. The MUS bargaining team consisted of Rob
23 Gannon, Chief Negotiator; Kevin McRae, Associate Commissioner for Communications
24 and Human Resources; Dave Forbes, U of M Administration, and Ashleen Williams,
25 ASUM President. Although this meeting was largely organizational in nature it was also
26 at this time that the UFA submitted its bargaining proposal on compensation to MUS. It
27 is the submission of this proposal that triggered the need for a counterproposal from
28 MUS. Whether the expectation of UFA was that the MUS counterproposal was then to
29 be submitted within 15 days, or merely in a timely manner is not clear, but clearly the
30 contract does not specify when counterproposals are to be exchanged and the ground
31 rules address the question only to the extent that proposals and counterproposals are to
32 be made in a timely manner the definition of which is at the heart of this complaint
33 before the Board of Personnel Appeals.
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37 When considering the timeliness of proposals and counterproposals, particularly in the
38 arena of compensation, one simply cannot be blinded to events transpiring away from
39 the table. The 62nd Legislative Session convened on January 3, 2011. Shortly
40 thereafter the budget for the MUS was reduced \$32 million below current level funding.
41 That level of reduction continued up to and including the date when MUS responded to
42 the instant charge. In addition, the proposed state employee pay plan – HB 13 - was
43 also in limbo during much of this same period, and ultimately was tabled in the House of
44 Representatives. In short, and as had been anticipated by many, the status of
45 appropriations in the public sector, including those for MUS, was very much in the air.
46 Although the UFA would have it otherwise, and believes it to be otherwise, all of this
47 had a demonstrable impact on the ability of the MUS to make economic offers to any of
48 its numerous bargaining units, including the UFA.
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1 It is in this vein that on January 31, 2011, Kevin McRae, in an e-mail to Tom Burgess,
2 advised Mr. Burgess of several items, the first being Mr. McRae's availability to be at
3 the table given his responsibilities to MUS. In addition to this Mr. McRae advised Mr.
4 Burgess of days he would be available to bargain as well as the fact that MUS would
5 likely be in a position to make economic proposals when the status of the state
6 employee pay plan was known and when the Board of Regents had addressed the
7 status of tuition at their May meeting. Mr. McRae went on to offer that he was receptive
8 to hearing faculty compensation proposals and that at the individual campuses non-
9 economic proposals could certainly be bargained between the unions and campus
10 administration. It cannot be said that MUS was refusing to bargain economic or non-
11 economic issues, an unfair labor practice, but it can be said with certainty that MUS was
12 pointing out the realities of the situation and trying to move forward with those items
13 within its ability to negotiate given the clouded fiscal situation.
14

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16 UFA continued to press MUS for an economic counterproposal and on February 25,
17 2011, the MUS negotiating team did respond to the compensation proposal of the UFA.
18 That response provided in part:
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21 As you know, the Board of Regents' official position on compensation is that the
22 Legislature has not yet appropriated funds to the Montana University System nor
23 has it passed HB 13 with funding for a compensation package for State and
24 University System employees. As such, the Board is not yet able to authorize a
25 bargaining proposal or agreement to increase salaries.
26

27 Consistent with the concepts of an interest based approach to bargaining, the MUS
28 response goes on to express interests, limitations, and commitment to move forward on
29 compensation issues when funding is clarified. Inconsistent with the interest based
30 approach, the MUS simply could have said "no" to the UFA compensation proposal and,
31 arguably at that point, been charged with violating the ground rules, a more or less
32 "damned if you do, damned if you don't" scenario. Interestingly enough, however, the
33 UFA bargaining note summary of the March 23, 2011, bargaining meeting, although
34 noting that MUS empathizes with the UFA's need to conclude bargaining before the
35 summer break, recognizes that the Commissioner's position is no pay raise. There was
36 a recognition that the MUS said "no" to a pay raise, at least at that point in time. Saying
37 "no" and/or hard bargaining is certainly not an unfair labor practice. See, for instance,
38 ULP 7 and 9-89, International Union of Operating Engineers Local 400 and International
39 Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of North America,
40 Local 2 vs. Flathead County Commissioners, 1989, and Section 39-31-305, MCA.
41 In any event, the January 31, 2011, e-mail coupled with the February 25, 2011, MUS
42 counterproposal constitute what the UFA describes as "the Administration's refusal to
43 provide a timely counterproposal, despite their express agreement to do so" and as
44 such, this "is a clear failure to negotiate in good faith collective bargaining".
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48 It is important to note that it is not as though bargaining was not ongoing between
49 December 23, 2010, and February 25, 2011, and for that matter to the date this
50 recommended order is issued. Numerous bargaining sessions have been held and

continue to be held. At a minimum, the following sections of the bargaining agreement are known by the investigator to be subject to bargaining:

9.310	Eligibility for Tenure Application (Admin)
9.340	Failure to Attain Tenure (Admin)
10.250	University Standards Committee (Admin)
2.800	Non-discrimination (UFA)
6.200	Academic Responsibility (UFA)
7.100	Faculty Senate (UFA)
7.200	Reassigned Time – Faculty Senate (UFA)
8.000	UFA Rights to University Committee Membership (UFA)
9.120	Appointment from a Non-tenurable Line to a Probationary Line (UFA)
10.260	Dean's Evaluation and Recommendation (UFA)
21.000	Student Complaint Procedure (UFA)

Moreover, it is not the case that the UFA compensation proposal was as simple as, for instance, an increase in base pay. Rather the proposal contained the following:

- Normal increase of 5% in each year effective October 1.
- Increase promotion increments to \$3,500 (associate) and \$7,000 (full) over two years.
- Increase merit increment to \$3,500 and number to 100 over two years.
- Limit market adjustments to respond to offers in hand only.
- Create an inversion/compression pool equivalent to 1% of total faculty salaries in each year.
- Create mechanism for adjunct bonus payments.
- Create mechanism for diversity adjustments.
- Set salary floors to percentage of median base salary by rank.
- Increase release time and stipend value for chairs.
- Increase Winter session rate to \$1,200 per credit.
- Create supplemental retirement account for each faculty member with a \$500 initial payment and a matching contribution thereafter.

In short, all of the above takes a certain amount of time to digest and through ongoing discussions the parties have worked to understand their respective proposals. There was no “refusal” on the part of MUS to provide a counterproposal and the February 25, 2011, counterproposal lays out the position of MUS in a positive, interest based fashion as opposed to what would have been a more “timely” fashion had MUS simply said “no” to the UFA proposals. Parenthetically, the UFA has referred to the process used by the executive branch and its model of pre-budget negotiations. That process too takes its time and economic offers are not made until budget revenues are fairly well known – October or November of legislative years. What MUS was awaiting is not inconsistent with what the executive branch needs in hand in order to make economic proposals and even then, as evidenced this round of negotiations, final, ratified agreements are not always reached as soon as might be desired. All things being considered, neither the collective bargaining agreement, the ground rules, or the conduct of the MUS, when considered in their totality, constitute bad faith bargaining. MUS may not have made economic proposals when expected by UFA, and the proposals when offered may have

1 not met the expectations of UFA, but neither the timing of counterproposals nor their
2 content constitute bad faith bargaining.
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4 Turning to the second element of the charge of the UFA, that the MUS committed an
5 unfair labor practice when it failed to provide a representative with the proper authority
6 to bargain compensation at scheduled bargaining, this element of the complaint lacks
7 merit. It is abundantly clear that Mr. McRae has been integrally involved in the
8 negotiations, even though not always at the table. Moreover, MUS clearly anticipated
9 that when the fiscal situation cleared Mr. McRae would be at the table to bargain
10 compensation issues. Nothing indicates anything to the contrary, and, in fact,
11 compensation proposals have now been made by MUS. The simple reality is that until
12 such time as the financial picture was clear enough to do so, neither Mr. McRae, or
13 anyone with MUS for that matter, would have been in a position to make economic
14 proposals or counterproposals other than "no" before substantively material action was
15 taken by the Legislature as well as the Board of Regents. As it were, the MUS took an
16 approach that has lead to offers of increased compensation. That approach has been
17 made by Mr. McRae and thus, there is no indication that he, as agent for MUS, did not,
18 and does not, possess such authority. The only question then is the timing of his
19 exercise of that authority, and as previously found, that timing did not constitute bad
20 faith bargaining.
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25 **III. Recommended Order**

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27 It is hereby recommended that Unfair Labor Practice Charge 18-2011 be dismissed as
28 without merit.
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30 DATED this 7th day of September 2011.
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34 BOARD OF PERSONNEL APPEALS
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37 By: _____/S/
38 John Andrew
39 Investigator
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2 NOTICE
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4 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
5 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
6 may be appealed to the Board. The appeal must be in writing and must be made within
7 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
8 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to
9 dismiss becomes a final order of the Board.
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14 CERTIFICATE OF MAILING
15

16 I, _____, do hereby certify that a true and correct copy
17 of this document was mailed to the following on the _____ day of _____
18 2011, postage paid and addressed as follows:
19

20
21 THORIN GEIST
22 ATTORNEY AT LAW
23 PO BOX 5988
24 MISSOULA MT 59806
25

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